

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY :
AVERAGE WHOLESALE PRICE : MDL NO. 1456
LITIGATION :
: Civil Action No. 01-12257-PBS
: :
: Judge Patti B. Saris
: (case pending in D. Mass.)
THIS DOCUMENT RELATES TO THE :
CONSOLIDATED CLASS ACTION :
:

**NON-PARTY NATIONAL HERITAGE INSURANCE COMPANY INC.'S NOTICE
OF VOLUNTARY PRODUCTION OF DOCUMENTS AND OPPOSITION TO
DEFENDANTS' REQUEST FOR SANCTIONS**

By this Notice, Non-Party National Heritage Insurance Company ("NHIC") hereby advises this Court that it has produced all of the documents sought by Defendant Aventis Pharmaceuticals, Inc., on behalf of itself and all other Track Two Defendants ("Defendants") in their Second Motion to Renew Their Motion to Compel—specifically, the internal and external guidelines described in ¶¶ 3-4 of NHIC's Proposed Order. NHIC made this production on July 12, 2006, by delivery of CD's containing electronic documents and copies of paper documents to Defendants' counsel. *See* July 12, 2006 Letter (attached as Exhibit A). Thus, NHIC has voluntarily completed the production contemplated by its Proposed Order, including the production request that is the subject of Defendants' Second Motion to Renew Their Motion to Compel, even though this Court has not yet acted on Defendants' original motion to compel.¹

¹ Defendants argue that NHIC's Proposed Order, filed on May 12, 2006, reflects NHIC's willingness to produce the internal and external guidelines "on or before June 5, 2006." Second Motion at 1. This statement, however, is incomplete and therefore misleading. Defendants neglect to mention that NHIC's Reply to Defendant's Opposition, filed on May 24, 2006, asks this Court to extend the

In addition, NHIC objects to Defendants' request for sanctions. The purported basis for Defendants' request is that "NHIC has failed to respond to the Track Two Defendants' request for a discovery conference." Second Motion at 2. This contention is baseless. In fact, Defendants never made any effort to initiate a discovery conference. Defendants assert that they attempted to initiate a discovery conference "by letter dated June 28, 2006." *Id.* at 3. That letter, which NHIC received at 5:09 p.m. on Thursday, June 28, 2006, threatens to file a renewed motion to compel if NHIC did not produce documents by Monday, July 3, 2006—one business day later. It concludes, "[i]f you would like to discuss this matter, please feel free to contact me." *See* June 28, 2006 Letter (attached as Exhibit B). No reasonable person would interpret this perfunctory, boilerplate language as an attempt to "initiate a discovery conference." Moreover, Local Rule 37.1(A) expressly allows opposing counsel one week to respond to a request for a discovery conference; by contrast, Defendants' letter expressly allows NHIC only one day to comply with their demand before they would file their threatened motion. Accordingly, Defendants' request for sanctions is baseless and misleading.

Finally, Attorney Bierman's sworn statement that she has "not received a response to either" of the two letters she sent to NHIC is demonstrably false.² *See* Bierman Affidavit (attached as Exhibit C). On June 13, NHIC responded to Attorney Bierman's first letter, stating, "NHIC will also produce its internal and external guidelines as soon as possible." *See* June 13, 2006 Letter at 2, and transmittal e-mail (attached as Exhibit D). NHIC did not

deadlines originally proposed by NHIC. Thus, it is simply inaccurate to suggest that NHIC made a unilateral, open-ended, binding commitment to produce these documents by June 5, 2005.

² Ms. Bierman's Affidavit states that she made this assertion "under penalty of perjury." *See* Bierman Affidavit. Thus, it is doubly surprising that she would make such a transparently false statement. This Court should not countenance such duplicity from counsel under oath.

respond to Attorney Bierman's June 28, 2006 letter to NHIC threatening to file Defendants' renewed motion to compel on the next business day. When NHIC received that letter, it was in the final stages of preparing the documents for production, a process that took longer than expected. Given that NHIC could not possibly comply with Defendants' unreasonable demand—and was under no obligation to produce the documents by the date demanded by Defendants—NHIC saw no reason to respond to the June 28, 2006 demand letter.

CONCLUSION

Because NHIC has produced the documents that are the subject of Defendants' Second Renewed Motion to Compel, thereby rendering that motion moot, and because Defendants' associated motion for sanctions is entirely without merit, NHIC respectfully requests that Defendants' Second Renewed Motion to Compel be denied in its entirety.

Respectfully submitted,

**NON-PARTY
NATIONAL HERITAGE INSURANCE
COMPANY**

By: /s/ Benjamin M. Wattenmaker
Benjamin M. Wattenmaker
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Its Attorneys

CERTIFICATION

This is to certify that a copy of the foregoing was sent via electronic transmission on this 12th day of July, 2006, or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Benjamin M. Wattenmaker
Benjamin M. Wattenmaker

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July 12, 2006

Aimee E. Bierman, Esq.
Kirkpatrick & Lockhart Nicholson Graham L.L.P.,
State Street Financial Center
One Lincoln Street
Boston, MA 02111-2950

Re: In re AWP Litigation MDL 1456

Dear Aimee:

Pursuant to ¶¶ 3-4 of NHIC's Proposed Order Granting in Part and Denying in Part Defendants' Motion to Compel NHIC to Produce Documents, and NHIC's Motion to Quash, please find enclosed the following items for production:

- Photocopies of NHIC's internal and external guidelines for processing Medicare Part B reimbursement payments (numbered NHIC 00715 – 00999);
- Two CDs, identified as Volume: MMDL001; and Volume: MMDL002. These CDs contain additional documents.

Very truly yours,

Benjamin M. Wattenmaker (mms)
Benjamin M. Wattenmaker

BMW:mms

Enclosures

cc: Michael DeMarco, Esq.
James P. Muehlberger, Esq.
Michael D. Ricciuti, Esq.
Aimee E. Bierman, Esq.
Leslie M. Stafford, Esq.
Andy J. Mao, Esq.
Gary S. Starr, Esq.

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Lakeville

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June 28, 2006

Aimée E. Bierman

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abierman@klng.com

By E-Mail and Facsimile

Benjamin M. Wattenmaker, Esq.
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103-1919

**Re: In re Pharmaceutical Industry Average Wholesale Price Litigation
MDL 1456**

Dear Ben:

On June 13, 2006 I wrote to you to reiterate Aventis' request for NHIC's internal and external guidelines for processing Medicare Part B reimbursement payments, which NHIC had previously offered to produce by June 5, 2006, as set forth in the proposed order NHIC filed with the Court on May 11, 2006 (Docket Entry No. 2556).

It has now been 23 days since June 5, 2006, the date by which NHIC offered to produce these documents and 15 days since my last request to you regarding these materials, to which you have not responded. If we do not receive these materials by July 3, 2006 we will be forced to immediately refer this issue to Magistrate Bowler to further compel discovery on this issue and seek any other relief as necessary.

If you would like to discuss this matter, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Aimée E. Bierman'.

Aimée E. Bierman

AEB/gmf

cc: Gary S. Starr, Esq. (By E-Mail and Facsimile)
James P. Muehlberger, Esq. (By E-Mail)
Michael DeMarco, Esq. (By E-Mail)
Michael D. Ricciuti, Esq. (By E-Mail)
Nicholas P. Mizell, Esq. (By E-Mail)
Leslie M. Stafford, Esq. (By E-Mail)
Andy J. Mao, Esq. (By E-Mail)

BOS-983607 v1 5544510-0903

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om: Bierman, Aimee E. [abierman@klng.com]
ent: Wednesday, June 28, 2006 5:09 PM
o: Wattenmaker, Benjamin M.
c: Starr, Gary; Andy.Mao@usdoj.gov; Leslie.Stafford@hhs.gov; JMUEHLBERGER@shb.com; NMIZELL@shb.com; Glynn, David M.; Blase, Gregory N.; DeMarco, Michael
ubject: Fw: LT B. Wattenmaker (082163-1 06/28/2006 04:25:52 PM)

from my BlackBerry Wireless Handheld

Original Message-----

1: Lord, Cynthia B. <clord@klng.com>
Bierman, Aimee E. <abierman@klng.com>
: Wed Jun 28 16:27:00 2006
ect: LT B. Wattenmaker (082163-1 06/28/2006 04:25:52 PM)

3OS-#983632-v1-LT_B_Wattenmaker_(082163-1_06_28_2006_04_25_52_PM).PDF>>

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY)	
AVERAGE WHOLESALE PRICE)	MDL NO. 1456
LITIGATION)	Civil Action No. 01-12257-PBS
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THIS DOCUMENT RELATES TO THE)	Hon. Patti B. Saris
AMENDED MASTER CONSOLIDATED)	Chief Mag. Judge Marianne B. Bowler
CLASS ACTION)	
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**DECLARATION OF AIMEE E. BIERMAN IN SUPPORT OF
TRACK TWO DEFENDANTS' SECOND MOTION TO RENEW THEIR MOTION TO
COMPEL (DOCKET ENTRY NO. 2162) DIRECTED TO
NATIONAL HERITAGE INSURANCE COMPANY IN ITS CAPACITY AS THE
MEDICARE PART B CARRIER FOR MASSACHUSETTS**

I am an associate in the law firm of Kirkpatrick & Lockhart Nicholson Graham LLP, representing Defendant Aventis Pharmaceuticals Inc. I offer this declaration in support of the Track Two Defendants' Second Motion to Renew Their Motion to Compel (Docket Entry No. 2162) Directed to National Heritage Insurance Company in its Capacity as the Medicare Part B Carrier for Massachusetts.

1. Attached hereto as Exhibit A is a June 13, 2006 letter from Aimée E. Bierman to Benjamin M. Wattenmaker.
2. Attached hereto as Exhibit B is a June 28, 2006 letter from Aimée E. Bierman to Benjamin M. Wattenmaker.

I have not received a response to either of these letters.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 7, 2006

/s/ Aimée E. Bierman
Aimée E. Bierman

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2006, I caused a true and correct copy of the foregoing to be served on all counsel of record by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL 1456.

/s/ Aimée E. Bierman

Aimée E. Bierman

D

bmr



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June 13, 2006

Aimee E. Bierman, Esq.
Kirkpatrick & Lockhart Nicholson Graham L.L.P.
State Street Financial Center
One Lincoln Street
Boston, MA 02111-2950

Re: In re AWP Litigation MDL 1456

Dear Aimee:

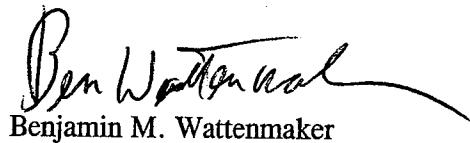
Your June 13, 2006 letter requested: (1) the original signed Declaration of Darlene Murphy, a copy of which was sent to Nick Mizell on June 5, 2006; and (2) NHIC's internal and external guidelines for processing Medicare Part B reimbursement payments.

NHIC will forward the Declaration to Mr. Mizell as soon as possible. However, since you did not make your request for the Declaration until 2:36 p.m. this afternoon, NHIC may not be able to have the document delivered tomorrow.

Aimee E. Bierman, Esq.
June 13, 2006
Page 2

NHIC will also produce its internal and external guidelines as soon as possible. We should be able to produce these documents by Friday, June 16.

Very truly yours,


Benjamin M. Wattenmaker

cc: Michael DeMarco, Esq.✓
James P. Muehlberger, Esq.✓
Michael D. Ricciuti, Esq.✓
Aimee E. Bierman, Esq.✓
Leslie M. Stafford, Esq.✓
Andy J. Mao, Esq.
Gary S. Starr, Esq.

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McConnell, Germaine R. *Bmu*

From: McConnell, Germaine R.
Sent: Tuesday, June 13, 2006 5:04 PM
To: 'Bierman, Aimee E.'
Cc: 'mdemarco@kln.com'; 'jmuehlberger@shb.com'; 'mriccuiti@kln.com'; 'Leslie.Stafford@hhs.gov'; 'andy.Mao@usdoj.gov'; Starr, Gary
Subject: NHIC

THIS EMAIL IS BEING SENT ON BEHALF OF BENJAMIN M. WATTENMAKER.

Please see attached.



nhic.pdf (34 KB)

Germaine R. McConnell
Legal Secretary
Phone: 860-251-5042
Fax: 860-251-5318
Email: gmcconnell@goodwin.com

THE INFORMATION IN THIS TRANSMISSION IS PRIVILEGED AND CONFIDENTIAL AND INTENDED ONLY FOR THE RECIPIENT LISTED ABOVE. IF YOU HAVE RECEIVED THIS TRANSMISSION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY E-MAIL AND DELETE THE ORIGINAL MESSAGE. THE TEXT OF THIS E-MAIL IS SIMILAR TO ORDINARY TELEPHONE OR FACE-TO-FACE CONVERSATIONS AND DOES NOT REFLECT THE LEVEL OF FACTUAL OR LEGAL INQUIRY OR ANALYSIS WHICH WOULD BE APPLIED IN THE CASE OF A FORMAL LEGAL OPINION.